No. 18-422

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, ET AL.,

APPELLANTS,

v.

COMMON CAUSE, ET AL.,

APPELLEES.

On Appeal from the United States District Court
for the Middle District of North Carolina

BRIEF OF AMICUS CURIAE STEPHEN M. SHAPIRO IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS[1]

Amicus Stephen M. Shapiro lives in Maryland's Eighth Congressional District. He filed the original and first amended complaints in what is now *Lamone v. Benisek*, pro se, in 2013, and was the petitioner when that case was before this Court as *Shapiro v. McManus* in 2015. After that case was remanded in 2016, plaintiffs focused their challenge more narrowly on the First Amendment harms to Republican voters within the former Sixth District, and amicus withdrew to avoid challenges to his standing. Amicus files here to provide insights on Article I, on which Appellees here rely, that are also relevant to the circumstances Appellees in *Benisek* attack on First Amendment grounds in that case.

SUMMARY OF ARGUMENT[2]

Part I of this brief answers key questions:

(1) Does a state abridge voters' right to choose their Representative when it preselects the party of the likely election victor through a district's design?

(2) Does it further offend Article 1 that the state does so to further its choice of the party controlling the U.S. House of Representatives?

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[1] This brief is filed pursuant to a blanket consent filed by all parties. No person other than amicus and his counsel has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission.

[2] Amicus has also filed a brief in *Lamone v. Benisek*, No. 18-726, which offers argument applicable here as well.

Part I then develops standards and argues that if the Court adopts a predominance standard to test for actionable intrusions of representational rights, evidence of intrusion should be balanced against factors the state reasonably and legitimately adopted to enable effective representation.

Part II of this brief argues why questions (1) and (2) cannot be exclusively committed to Congress.

The North Carolina General Assembly abridged voters' Article I right to choose their Representatives and exceeded its Article I authority to facilitate congressional elections when it configured the state's congressional districts to preselect the likely party of each Representative. *See Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (reaffirming that legislatures may not use Article I, § 4 authority—to regulate the "manner" of elections—so as to "dictate electoral outcomes"); *U. S. Term Limits*, 514 U. S. 779, 820–21, 833–34 (1995) (holding that state-imposed term limits violate voters' Article I, § 2 rights and exceed states' Article I, § 4 authority).

This case surpasses any plausible standard for violations with respect to breadth of impact beyond a district as well as depth of impact within a district. First, this violation has national impacts, triggering a viable threshold standard for when a partisan gerrymandering case most strongly demands judicial resolution—when such district-by-district preselection implements a plan to achieve or maintain a statewide configuration tilting districts to a favored party. A statewide configuration, as here, has this national impact. More than "root and

branch" internal state politics, it is a concerted effort to advance the legislature's partisan preference—not just within North Carolina, but for overall partisan control of the U.S. House of Representatives. Replication, in other Republican-leaning states also using REDMAP—and then in Democratic-leaning states such as Maryland—turns state legislatures into an electoral college of sorts for determining control of the U.S. House of Representatives. Nothing in Article I or this Court's precedents remotely affords legislatures such a role.

While district-by-district violations alone warrant intervention, this standard would allow the Court to set a minimum impact level for actionable cases. This threshold standard stems from this Court's precedent on political question doctrine—that judicial intervention is most imperative when "a controversy affect[s] the structure of the national government as established by the provisions of the national Constitution," as this case does. *See Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (distinguishing such impacts from those of political questions).

In a district-by-district analysis, this Court should announce that *any* dilution of disfavored voters done to predetermine a district's likely party choice is an actionable violation. *Cf. Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (holding *any* unjustified variance from exact population equality violates the one-person one-vote standard for congressional districts mandated by Article I, § 2); Appellees and amicus do offer predominance as a manageable limiting alternative that lower courts

could readily implement. But while predominance is consistent with this Court's racial cases, *see e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 905–06 (1996), a more exacting standard analogous to *Karcher* is appropriate in an Article I context as here. And this standard may well be more manageable than predominance, as it would not encourage states to test a predominance limit.

In order to support a lower court's district-by-district analysis—particularly if this Court adopts a predominance standard to assess violations—the Court should announce that intrusion upon voters' representational rights shall be considered a district design's predominant focus *unless* the design is found to predominantly incorporate features that the state reasonably and legitimately adopted to support its citizens' effective representation. Article I, § 2 affords citizens a right to effective representation, and states have a duty to facilitate that right in their enactment of districts. *Cf. Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) ("The object of districting is to establish 'fair and effective representation for all citizens.'")); *Gralike*, 531 U.S. at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (defining the state's Article I, § 4 duty as being to "enforce the fundamental right involved" under Article I, § 2).

If a state must *not* predominantly design a district to predetermine the party of the victor—or to dilute disfavored voters toward that end—it helps courts and states to know what states *are* supposed to do. This balancing process is similar to how courts

determine predominance to test for impermissible racial gerrymandering. *Cf., e.g., Shaw*, 517 U.S. at 907. It is also analogous to this Court's cases considering variance justifications under the one-person one-vote standards for congressional and state legislative districts. *See, e.g., Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1310 (2016); *Tennant v. Jefferson County Comm'n*, 567 U.S. 758, 764 (2012); *Karcher*, 462 U.S. at 730–33; *Swann v. Adams*, 385 U.S. 440, 443–44 (1967). While *Gralike* and *Smiley* specifically addressed voters' right to choose Representatives, a predominance test for compliance should incorporate the constitutional purpose of these Representatives, consistent with the Framers' intent and the term's contemporary and current definitions.

Finally, the Court's precedents on political question doctrine demand intervention here. The doctrine does not apply to state actions. *Baker v. Carr*, 369 U.S. 186, 210 (1962). Nor does this case implicate any of the criteria suggesting an exclusive commitment to Congress. *Id.* at 217. Standards relevant to Article I are readily discoverable. Further, this Court has never found that a case implicated a constitutional provision, yet deemed the case political merely for lack of standards. This observation makes sense; finding that a constitutional provision is implicated, as here, inherently suggests the presence of a standard sufficient for deciding at least that case. And more generally applicable standards discoverable here are as manageable, if not more, than those the Court has announced to interpret a wide range of

constitutional mandates and prohibitions. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001) (announcing a standard for regulatory takings).

This case presents a question of the constitutional floor set by Article I, below which the range of political districting decisions may not descend. *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979) (noting the Court's responsibility to "scrupulously" inquire into a violation of a constitutional provision or statute, while leaving to political officials the "wide range of 'judgment calls' that meet constitutional and statutory requirements"). This case also presents a need to enforce the separation of powers between the People and the states. *Cf. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (finding a judicial duty to determine whether a statute intrudes on executive powers); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 852 (D.C. Cir. 2010) (Ginsburg, J., concurring) ("The result of staying the judicial hand is to upset rather than to preserve the constitutional allocation of powers."). While the separations referenced in those cases were specific to the federal branches, this principle is equally compelling here, where North Carolina exceeded its Article I authority and intruded into that of voters.

ARGUMENT

APPELLANTS VIOLATED ARTICLE I BY PRESELECTING THE PARTY OF THE STATE'S REPRESENTATIVES; POLITICAL QUESTION PRECEDENTS REQUIRE INTERVENTION

I. North Carolina's Congressional Districts Violate Article I, §§ 2 & 4.

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States * * * .
>
> U.S. Const. art. I, § 2

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations * * * .
>
> U.S. Const. art. I, § 4

North Carolina violated three discernible mandates relevant here. First, Article I, § 2 of the Constitution affords voters, not states, the right to select their Representatives in Congress. U.S. Const. art. I, § 2; *U. S. Term Limits*, 514 U. S. 779, 820–21 (1995). Accordingly, states exceed their Article I, § 4 authority to regulate elections if they

"dictate electoral outcomes" or "favor or disfavor a class of candidates." *Cook v. Gralike*, 531 U.S. 510, 523–24 (2001) (quoting *U.S. Term Limits*, 514 U.S. at 833–34) (striking a ballot designed to influence the election result by adding notations next to candidates' names with whom the state disagreed). Appellants abridged this mandate by designing districts so as to preselect the party of each Representative.

Second, Article I, § 2 forbids placing disfavored voters into districts so as to minimize the weight of their votes relative to those of favored voters. *Wesberry v. Sanders*, 376 U.S. 1, 14, 17 (1964) (explaining the Court's one-person one-vote holding). Appellants abridged this second mandate by cracking and packing populations of disfavored voters in pursuit of abridging the first mandate. Third, Article I, §§ 2 and 4 imply a duty to design districts consistent with their constitutional purpose—to facilitate effective representation. *Cf. Gralike*, 531 U.S. at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932) (defining the state's Article I, § 4 duty as to "*enforce the fundamental right involved*") (emphasis added)); *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (stating that "fair and effective representation" is the purpose of districting."). Appellants subordinated this duty to pursue abridging the first two Article I mandates.

A. A State May Not Choose the Party of a District's Representative

The General Assembly violated Article I, §§ 2 and 4 by preselecting the party of each district's Representative through its design of North Carolina's 2016 congressional districts. Article I, § 2 reserves such choice for the voters. *U. S. Term Limits*, 514 U. S. at 813–14 (recounting the Framers' positions that the People should choose their Representatives); *id.* at 820–21 (holding that state-imposed term limits on Representatives violate the voters' right to choose under Article I, § 2); *id.* at 891 (Thomas, J., dissenting) (recounting the Framers' development of Article I, § 2 to implement their decision that voters should choose Representatives). Such choice is *exclusive* to voters. *Id.* at 857, 882 (finding the clause leaves the "selection of the Representatives * * * entirely to the people" with "virtually unfettered discretion"). Thus, a state may not assume any degree of the voters' choice here as a spoil of war—to the victorious party of state elections to the General Assembly.

The Framers were clear in their concern that the legislatures not intrude upon their voters' right to choose Representatives. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2672 (2015) (quoting discussions of the Framers reflecting such concerns); *Vieth v. Jubelirer*, 541 U.S. 267, 275–76 (2004) (quoting the same discussions).

U.S. Term Limits held that the right to choose in Article I, § 2 was abridged by state-imposed term

limits on Representatives. 514 U. S. at 820–21. In that case, voters would not be able to elect their incumbent, but they could freely elect anyone other than the incumbent; the state was not preselecting the party of the new Representative. In this case, while the voters placed within each district are "choosing," it is not be the "unfettered discretion" Article I, § 2 demands. Voters' choice in the general election is more akin to ratifying the choice of party made by the General Assembly through redistricting. The actual selection of the individual Representative is made by primary voters, with the state shutting Appellees out of the real choosing. While this scenario is similar to that in many non-gerrymandered districts that lean heavily to one party, the leaning here was purposefully engineered toward this result. This infringement on the election result, and hence on voter choice, is greater than that which this Court struck down in *U.S. Term Limits*. That precedent requires the same holding to strike this greater abridgment of Article I, § 2.

The analysis of Article I, § 4 is nearly identical, as state action inherently exceeds the scope of its authority if it violates Article I, § 2. This Court has been just as clear that the General Assembly must not use its Article I, § 4 authority to "dictate electoral outcomes" or "favor or disfavor a class of candidates." *Gralike*, 531 U.S. at 523–24 (quoting *U.S. Term Limits*, 514 U.S. at 833–34). Article 1, § 4 provides states no authority to directly or indirectly influence the choosing of Representatives through its setting the "manner" of elections. *See id.* Rather, Article I, § 4 mandates a duty to enact "procedure and safeguards * * * necessary * * * to

enforce the fundamental right involved." *Id.* at 524 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

Thus, a state's authority under Article I, § 4 is limited to that needed to facilitate their citizens' representational rights under Article I, § 2. *See id.* And Article I, § 4 is exclusive; a state has no other authority it can bring to bear in setting the manner of congressional elections, *id.* at 522–23; *U.S. Term Limits*, 514 U.S. at 804–05, whether designing ballots or congressional districts. Even if North Carolina did have other enumerated or reserved powers it could bring to bear in its course of redistricting, the Privileges or Immunities Clause forbids North Carolina to apply *any* power in a manner that abridges the Article I, § 2 rights of its citizens. *See infra* Section I.C.

Here, the General Assembly has done precisely that which *Gralike* and *U.S. Term Limits* forbid. It specifically designed each of North Carolina's ten Republican-leaning districts to favor Republican and disfavor Democratic candidates. It did the opposite in the other three packed Democratic-leaning districts to facilitate tilting the other ten. J.S. App-14–App-18. While the court below found some districts would have leaned toward their tilted party in a non-gerrymandered scenario, *see e.g.*, J.S. App-243, that cannot excuse the result in either the other districts or the overall plan. And Article I, § 4 is violated in both the packed and cracked districts. *Cf. Shaw*, 517 U.S. at 907 (finding both impermissible in a racial gerrymandering case).

In *Gralike*, this Court struck down a ballot design because it placed a negative notation by the name of a candidate with whom the state disagreed on a policy issue. 531 U.S. at 514–15, 523. Voters there could still elect the candidate despite the state's preference. But this Court held the ballot design exceeded the state's Article I, § 4 authority. *Id.* at 525–26. Here, the General Assembly designed districts to make the election of nominees with whom the state disagreed on policy unlikely—because the state fenced out the number of disfavored voters the state believed sufficient to achieve the desired outcome. Both in *Gralike* and here, the state acted under Article I, § 4 authority to set the "manner" of congressional elections. U.S. Const. art. I, § 4. *Gralike* compels the same holding here; the General Assembly exceeded Article I, § 4.

In *U.S. Term Limits*, this Court similarly struck down state-imposed term limits as exceeding a state's Article I, § 4 authority to set the "manner" of congressional elections. 514 U.S. at 828. This Court held such term limits impermissibly "dictate electoral outcomes" and "favor or disfavor a class of candidates." *See id.* at 833–34. Here, the General Assembly did just that in designing North Carolina's congressional districts as discussed *supra*. It exceeded merely facilitating the elections by doing so in a manner proactively determining the likely electoral outcome—favoring Republican candidates. The state in *U.S. Term Limits* merely precluded voters from electing certain incumbents. The degree of "dictation" and "favoring" is even greater here. *U.S. Term Limits* compels holding that the General Assembly exceeded its Article I, § 4 authority.

These Article I, §§ 2 and 4 violations cannot have become constitutional by the fact that some degree of gerrymandering may be a longstanding practice. *See Elrod v. Burns*, 427 U.S. 347 353-55 (1976) (striking political patronage actions despite long history). States cannot have gained adverse possession of voters' Article I rights merely because these merits have not been decided by this Court before now. *See District of Columbia v. Heller*, 554 U.S. 570, 625–26 (2008) (listing many constitutional rights that remained "unilluminated" until litigated, one for "nearly two centuries after the founding").

While this Court can and should readily decide this case based on *Gralike* and *U.S. Term Limits*, this case is distinguished by a scope of impacts beyond just North Carolina. While district-by-district impacts alone warrant intervention, the national impacts posed by this case could serve as a standard for when a partisan gerrymandering case most strongly demands judicial intervention: when it implements a plan to achieve or maintain a *statewide* configuration tilting districts to a favored party. The intent and impact of this statewide configuration is to advance the legislature's partisan preference—not just within North Carolina—but for overall partisan control of the U.S. House of Representatives. Replication in other states, such as in Maryland, is turning state legislatures into a de facto electoral college for influencing if not determining partisan control of the U.S. House of Representatives. *See* Evan Bonsall & Victor Agbafe, *Redrawing America: Why Gerrymandering Matters*, Harv. Pol. Rev. (May 24, 2016),

http://harvardpolitics.com/united-states/redrawing-america-gerrymandering-matters/
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Amber Phillips, *The 2020 Redistricting War is (Already) On*, Wash. Post (July 16, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/07/16/the-2020-redistricting-war-is-on/
(describing efforts of both national parties to capture state legislatures before the 2020 districting cycle).

Nothing in Article I or this Court's precedents remotely affords the states such a role—or authorizes them to intrude upon the Article I rights of voters on such a grand scale. Judicial intervention is most imperative when "a controversy affect[s] the structure of the national government as established by the provisions of the national Constitution," as this case does. *Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) (distinguishing such cases from those posing political questions or purely local questions). The cases cited in *Highland Farms* as such controversies of national significance addressed the separation of powers between the federal political branches. Ramifications to the structure of Congress—posed by this legislature's taking a role in determining the party in control of the House of Representatives—similarly demand this Court's intervention here.

The text of Article 1, §§ 2 and 4 themselves serve as standards for concluding that Appellees voting rights were abridged and that the General Assembly went beyond merely setting the manner of elections. Interpretations of these provisions, guided by this

Court's precedents, afford similarly manageable standards to confirm district-by-district violations:

> Did the legislature design the challenged congressional district so as to preselect the party of the Representative from that district?

This standard interprets abridging the voters' right to choose under Article 1, § 2 to include a state's preselection of the Representative's party. It similarly incorporates an Article 1, § 4 benchmark from *U.S. Term Limits*, 514 U.S. at 833–34 (noting that "dictat[ing] electoral outcomes" exceeds a state's Article 1, § 4 authority).

> Did the legislature design the challenged district to favor candidates of a party or to disfavor those of another?

This standard incorporates another Article 1, § 4 benchmark from *U.S. Term Limits*, 514 U.S. at 833–34 (noting that "favor[ing] or disfavor[ing] a class of candidates" exceeds Article 1, § 4 authority). A very similar Article 1, § 2 benchmark from *Wesberry*, 376 U.S. at 4, recasts this from the *voter's* perspective:

> Did the legislature design the district to favor or debase the impact of certain voters so as to elect a candidate of the legislature's favored party?[3]

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[3] This dilution question also sounds in the First Amendment. *See* J.S. App-276, App-280, App-286. *See also* Br. Appellees 27–28, *Lamone v. Benisek*, No. 18-276 (offering similar questions as a standard). Appellees are burdened not just on account of their prior votes—constituting unlawful retaliation, Br. Appellees 25, *Lamone*—but also on account of their

Here, the answers to all three are simple, as Appellants actions admitted it through clear and convincing evidence. Appellants directed a hired expert who, using REDMAP, configured North Carolina to have ten Republican-leaning districts, and three Democratic-leaning districts. They implemented this plan by cracking some areas with largely Democratic voting histories, while packing others—through precise analysis and siting of each precinct. J.S. App-14–App-18.

Similarly, this case breaches a subsidiary standard looking to what a legislature does, as the General Assembly did here, to implement its choice—to crack and pack precincts based on party to craft districts favoring the party of its choice. In this way, a violation can be proven by showing precincts were arranged within a challenged district with the intent of diluting voters of a plaintiff's party, with the purpose and effect of achieving a projected outcome disfavoring the candidate of the plaintiff's party. Injury occurs when the legislature enacts a map with one or more such districts. While each district would be examined individually, a statewide plan—such as the General Assembly directed its expert to prepare here—and other multidistrict evidence would certainly be relevant in the examination of individual districts. *Bethune-*

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projected future votes. Thus, within a congressional district, the harm attributable to a First Amendment violation includes this Article I, § 2 abridgment—and conversely, Appellees here incur First Amendment injuries as an element of the overall harm to their representational rights.

Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 800 (2017). While districts may not superficially appear cracked at first glance—*compare* JA-328 (N.C. districts), *with* JA-945, *Lamone v. Benisek*, No. 18-726 (Md. districts)—courts, as here, are capable of finding and analyzing the facts needed to perform this test. *See e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017) (reviewing a complex racial gerrymandering case); *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (finding circumstantial facts in a complex voting rights case).

Mere lack of proportionality based on a vote for statewide office, even adjusted to account for densely populated areas greatly favoring one party, would not be sufficient. It could be one piece of potentially-relevant evidence, but would have to accompany sufficient direct or circumstantial evidence to prove the intentional arrangement of precincts to accomplish the legislature's purpose—to predetermine the likely election outcome. This Court should announce that a plaintiff must show such purpose, intent, and effect to prove an Article I claim. These showings should prevent finding violations in less than certain circumstances.

The question of how forcefully a legislature's hand must push on the scale to constitute an abridgment is more a question of what should constitute an *actionable* abridgment. First, Appellants themselves answered this question—in how forcefully *they* opted to press on the scale. Here, Appellants designed the amount of push within each district to achieve an overall ratio comprising ten Republican-leaning seats. It makes no difference to

Article I whether Appellants had chosen to push less within individual districts, with a goal to tilt eleven seats to be sufficiently Republican, or to push harder to tilt nine more firmly and definitively.

Second, nothing in Article 1, §§ 2 or 4 or in the Framers' discussions of these sections suggests that a legislature may assume *any* role in the selection of Representatives. *U.S. Term Limits*, 514 U. S. at 813–14, 820–21; *id.* at 857, 882, 891 (Thomas, J., dissenting). Article 1, § 2 is abridged when the enacted "manner" of election poses any unjustified intrusion upon the selection. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123, 136 (1992) ("[T]he level of the fee is irrelevant. A[n unconstitutional] tax * * * does not become more constitutional because it is a small tax.").

A standard permitting no concerted abridgment is also consistent with this Court's precedents holding that Article I, § 2 precludes any unjustified dilution of *congressional* districts in the one-person one-vote context, whereas this Court enforces one-person one-vote within *state* legislative districts under the Equal Protection Clause, where a ten percent variance is presumed compliant. This affords states some discretion to pursue legitimate non-discriminatory goals in state districts. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306–07 (2016); *Karcher*, 462 U.S. at 730–33 (contrasting the Court's precedents); *Tennant*, 567 U. S. at 764–65 (permitting a 0.79 percent variance to avoid splitting a county—a tradeoff supporting representation); *White v. Weiser*, 412 U.S. 783, 793 (1973); *Roman v. Sincock*,

377 U.S. 695, 710 (1964) (allowing state districts having "minor deviations * * * that are free from any taint of arbitrariness or discrimination").

Setting an actionable abridgment standard may encourage states to test that line. *See Harris*, 136 S. Ct. at 1306–07 (noting the ten percent variance standard for enforcing one-person one-vote in state districts, and that a 9.9 percent variance presented was presumed compliant). However, the Court could establish an actionable standard of predominance, which has been proven manageable in the racial context. Here, testimony admits that achieving a ten-to-three configuration of Republican and Democratic districts was Appellants' predominant focus. Amicus argues that predominance is a proven, manageable standard in his brief in support of Appellees in *Lamone v. Benisek*, No. 18-726.

If a district is *not* to be predominantly designed to procure victory for the candidate of a legislature's favored party, it helps states and courts to know what Article I implies that the predominant focus of a district's design *must* be—on representation.

B. Enabling Effective Representation Must Take Priority over Engineering Election Outcomes

If this Court announces a predominance standard for finding an actionable violation of Article I, the Court should also announce that such abridgment shall be considered a district design's predominant focus *unless* the design is found to predominantly incorporate features that the state

reasonably and legitimately adopted to support its citizens' effective representation.

This Court announced a similar process to determine predominance in racial gerrymandering. *Shaw*, 509 U.S. at 647 (noting that traditional districting criteria may serve to refute a racial gerrymandering claim but are not required). In an Article I context, as here, representational rights afford a more pertinent basis for considering features that enable effective representation in a predominance analysis beyond merely refuting abridgment of voters' right to choose. A state would not be limited to traditional districting criteria here, but would have broad discretion to incorporate features that the state reasonably and legitimately adopts to support citizens' effective representation. However, a state would need to show these factors predominate where there is also significant evidence that factors focused on engineering outcomes. Voters' representational rights should win in a tie.

Particularly where there is only marginal evidence of a district being designed to engineer election outcomes, the design features chosen, and their application, are properly within a legislature's "wide range of judgment calls." *See Bell v. Wolfish*, 441 U.S. 520, 562 (1979). But a lesser presumption of wise discretion is in order where the evidence suggests otherwise. *Cf. Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (guiding judicial review of agency regulations).

A legislature has a duty to regulate congressional elections so as to facilitate their

citizens' representational rights. *Smiley*, 285 U.S. at 366. It follows that representational rights include a right to effective representation, and that states have a duty to design districts to enable and not inhibit that function. *See Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (noting that "fair and effective representation" is the purpose of districting"). When a state designs a district that subordinates its citizens' effective representation to favor the election of the legislature's preferred candidate, that design is particularly averse to Article 1, §§ 2 and 4—as it subordinates a duty mandated by these provisions to pursue a purpose these same provisions forbid.

The functions of a Representative are found in Article I, in the term's definitions, and in historic and current understandings of representation. Article I, § 8 lists the range of topics on which Representatives legislate. U.S. Const. art. I, § 8. In providing an early definition, Webster noted the role of Members of Parliament, who had far more limited duties in representing their constituents:

> A member of the house of commons is the representative of his constituents and of the nation. In matters concerning his constituents only, he is supposed to be bound by their instructions, but in the enacting of laws for the nation, he is supposed not to be bound by their instructions, as he acts for the whole nation.

Noah Webster, *American Dictionary of the English Language* (online ed. 1828) (defining Representative). *See also Black's Law Dictionary* (10th ed. 2014) (defining "representative" as

"someone who stands for or acts on behalf of another"); Webster, *supra* ("In legislative or other business, an agent, deputy or substitute who supplies the place of another or others, being invested with his or their authority"); Samuel Johnson, *A Dictionary of the English Language* 1682 (online ed. 1755) ("One exercising the vicarious power given by another").

The framers addressed the qualities needed for effective representation. George Mason argued that Representatives "ought to know and sympathise with * * * the community," reflecting "different interests and views arising from the difference of produce, of habits, etc." Wilbourne E. Benton, *1787: Drafting the U.S. Constitution* 197 (1986). Mason declared that "requisites in actual Representation are that the Representatives should sympathize with their constituents; should think as they think, and as they feel." *Id.* at 204. James Madison stated that Representatives must not have "a personal interest distinct from that of their Constituents." *Id.* at 267. Similarly, James Wilson held that the "true Doctrine of Representation is, that the Representative ought to speak the language of his Constituents, and that his voice should have the same influence, as if given by his Constituents." *Id.* at 102. Joseph Story concurred a few decades later:

> No reasoning, therefore, was necessary to satisfy the American people of the advantages of a [H]ouse of [R]epresentatives, which should emanate directly from themselves; which should guard their interests, support their rights, express their opinions, make known

> their wants, redress their grievances, and introduce a popular pervading influence throughout all the operations of the government.

Joseph Story, *Commentaries on the Constitution of the United States*, Book III, Ch. IX, § 573 (1833). The duties of a Representative are held remarkably similar today. *See* R. Eric Petersen, Cong. Research Serv., RL33686, *Roles and Duties of a Member of Congress: Brief Overview* (Nov. 9, 2012). This Court described the role of a Representative from a presumably non-cracked district as being to give a "minority of the people in a state * * * [a] voice * * * in the national councils." *Colegrove v. Green*, 328 U.S. 549, 553 (1946) (quoting 1 Kent, *Commentaries* 230–31 (12th ed. 1873)), *abrogation on other grounds recognized by Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964).

States have adopted a range of features in designing districts to support effective representation as just described. *See* Royce Crocker, Cong. Research Serv., R42831, *Congressional Redistricting: An Overview* (Nov. 21, 2012) (providing data on state adoption of specific districting features) Many of these adopted features incorporate commonalities, such as geography, that intuitively serve to combine residents likely to share local concerns, economic interests, and political opinions in a manner that supports their joint representation by a single Representative, performing the duties noted above on their behalf. *See* Crocker, *supra*, at 9–14; *cf. Shaw v. Reno*, 509 U.S. 630, 648 (1993) ("When a district obviously is

created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole.").

A court should be mindful of these duties and qualities of Representatives in reviewing the features adopted to determine whether their predominant focus was to facilitate citizens' effective representation or to intrude upon their choosing their Representative. Inexplicably sharp divergences in both geography and partisan preference within a single district may be highly suspect. But less divergence does not necessarily compel an opposite conclusion, as the design specifics employed to engineer a desired partisan outcome in one state may not be required to do the same in another, such as in North Carolina.

Here, the cracking and packing of Democratic areas to influence the election outcomes was the General Assembly's stated primary focus in designing North Carolina's congressional districts. J.S. App-14–App-18. That the General Assembly incorporated traditional districting criteria as a secondary focus does not disprove nor immunize the Article I violations. *See supra* Section I.A.

C. The Privileges or Immunities Clause Reinforces That a State May Not Abridge its Citizens' Article I Rights Using Any Source of Power

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.
>
> U.S. Const. amend. XIV, § 1, cl. 2

This Court has held that Article I, § 4 affords states their sole authority under which they may regulate congressional elections. *Gralike*, 531 U.S. at 522–23. This Court has also held that Article I, § 4 affords states no authority to regulate elections so as to abridge voters' Article I, § 2 rights. *U. S. Term Limits*, 514 U. S. at 820–21, 833–34.

The Privileges or Immunities Clause explicitly reinforces and expands beyond those holdings—protecting voters' Article I, § 2 representational rights in full, from any abridgment done through a state's use of its limited Article I, § 4 authority, or through any reserved powers a state could apply in either designing congressional districts or in support of any other state action that directly or indirectly causes such harm. U.S. Const. amend. XIV, § 1, cl. 2; *see U.S. Term Limits*, 514 U.S. at 842–45 (Kennedy, J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (citing *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884); *Wiley v. Sinkler*, 179 U.S. 58, 62–63 (1900)), *overruled on other grounds by Malloy v. Hogan*, 378 U.S. 1 (1964); *cf. Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 512 (1939) (holding that the rights of political assembly and speech are "a

privilege inherent in citizenship of the United States which the Amendment protects").

II. Political Question Doctrine Compels a Judicial Resolution Here

The question as to whether North Carolina's congressional districts violate Article I cannot be considered a *political* question. First, this question does not meet the two remotely applicable *Baker* criteria—a textual commitment to a political branch, or a lack of discoverable and manageable standards. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Second, this Court has never found that a claim implicated a constitutional provision, but then deemed it a political question *merely* for a lack of standards. The Court has also found such questions committed to a political branch or posing extraordinary prudential implications against judicial resolution. Finding that a constitutional provision is implicated, as here, inherently suggests the presence of a standard sufficient for deciding at least the case at hand. Further, the *Baker* criteria are not independently decisive but rather guides to assist a court in ultimately determining whether a question is at least impliedly committed to a political branch for decision. *See id.* at 210–11, 217.

At its root, a political question is one that is, textually or impliedly, *exclusively* committed to a political branch. *See id.* This Court has consistently recognized *its* duty to decide the constitutionality of legislative acts—distinguishing such legal questions from questions applying policy discretion *within the range* of constitutionality. *See e.g., Zivotofsky v.*

Clinton, 566 U.S. 189, 196–97 (2012) (quoting *INS v. Chadha*, 462 U.S. 919, 941–42 (1983) ("No policy underlying the political question doctrine suggests that Congress * * * can decide the constitutionality of a statute; that is a decision for the courts.")); *Bell*, 441 U.S. at 562 (noting the Court's responsibility to "scrupulously" inquire into a violation of a constitutional provision or statute, while leaving to policy officials the "wide range of judgment calls" that meet constitutional and statutory requirements); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150 (1912) (contrasting "the legislative duty to determine the political questions involved" with the judiciary's "ever-present duty * * * to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power."

"[The judiciary] is compelled, when called upon, to decide whether a law is constitutional or not. If it declines to declare it unconstitutional, that is an affirmance of its constitutionality." Joseph Story, *Commentaries on the Constitution of the United States*, Book III, Ch. XXXVII, § 1576, n.1 (1833).

The court below did not strike North Carolina's congressional districts as being repugnant to public policy, but rather because they violate Article I. Judicial abstention here would affirm the constitutionality of North Carolina's congressional districts, Story, *supra*, § 1576, and effectively announce an "anything goes" standard as the constitutional floor for the range of policy discretion.

A. This Court Cannot Properly Abstain Here Under the Political Question Doctrine

The question of whether North Carolina's congressional districts violate Article I cannot be considered political under *Baker*, 369 U.S. at 217. First, neither Article I, § 2 nor § 4 commit questions as to constitutionality to Congress or the General Assembly. Authority for these political branches to *legislate*, given in Article I, §§ 4 and 8, cannot be conflated as an implied commitment, or interpreted to afford them Article III powers. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring); *Zivotofsky*, 566 U.S. at 196–97 (*quoting Chadha*, 462 U.S. at 941–42)); *Vieth*, 541 U.S at 275–78 (discussing Congress' Article I, § 4 legislative authority, but not noting an implied commitment to Congress); *Bell*, 441 U.S. at 562.

Second, constitutionally-relevant manageable standards are readily discoverable here, *supra* Section I.A., and while these do include generally applicable standards, *Baker* requires resolution here even if an available standard would only decide this case. *See* 369 U.S. at 217. *See also District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) ("The very enumeration of the right takes out of the hands of [the judiciary] the power to decide on a case-by-case basis whether the right is *really* worth insisting upon."); *id.* at 628–29 ("Under any of the standards of scrutiny that we have applied to enumerated constitutional rights * * * [this statute] would fail constitutional muster."); *Gralike*, 531 U.S. at 530 (Kennedy, J., concurring) ("If there are to be cases

in which a close question exists regarding whether the State has exceeded its constitutional authority * * * this case is not one of them. In today's case the question is not close.")

The *Baker* criteria are not "stand-alone definitions," but are "guides" to "be used together with the Constitution" in determining "whether a question is entrusted * * * exclusively to a *federal* political branch." *Comer v. Murphy Oil USA*, 585 F.3d 855, 872 (5th Cir. 2009), *vacated and then dismissed for lack of quorum to hear en banc*, 607 F.3d 1049, 1055 (5th Cir. 2010); *see Baker*, 369 U.S. at 210–11, 217. The doctrine cannot commit questions to states, *see id.*, and a federal court is not free to abstain unless it finds the issue exclusively committed, *Comer*, 585 F.3d at 872 (citing *Boumediene v. Bush*, 553 U.S. 723, 771 (2008)). A court's review starts with interpreting the provision at issue for such a commitment. *Id.* at 875 (citing *Nixon v. United States*, 506 U.S. 224, 228 (1993)). Here, Appellees attack a *state* action—and this Court has noted a particular commitment *to the judiciary* to review state actions pursuant to the very provision at issue:

> The practical construction of Article I, § 4, is impressive. * * * [L]ong and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights, and hence subject to constant and careful scrutiny.

Smiley v. Holm, 285 U.S. 355, 369 (1932).

Relatedly, this case poses a question analogous to a separation of powers question—enforcing the Article I bounds of authority between voters and the General Assembly. Thus, deferral here on political question grounds would be particularly imprudent since it would *sub silentio* locate this boundary against voters and in favor of the General Assembly. *Cf. El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 857 (D.C. Cir. 2010) (Kavanaugh, J., concurring) ("[Abstention] would systematically favor the Executive Branch over the Legislative Branch—without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues.") While *El Shifa* involved a federal statutory claim, abstention here would similarly and imprudently favor the General Assembly by default, just as deferral in a federal statutory case could unduly favor the Executive.

Consistent with the purpose of the doctrine—to abstain from reaching questions exclusively committed to federal political branches—this Court has never found that a claim implicated a constitutional provision, but then deemed it a political question for lack of standards—unless the Court also found the question was committed to a political branch or that it posed extraordinary prudential implications against judicial resolution. *See e.g.*, *Pacific States*, 223 U.S. at 151 (finding a claim based on the Guarantee Clause committed to Congress); *Coleman v. Miller*, 307 U.S. 433, 452–54 (1939) (finding that while the Constitution requires time limits for ratifying constitutional amendments,

the setting of such limits was impliedly committed to Congress—as the Court's lack of standards and prudential implications both weighed against announcing a time limit); *Colegrove v. Green*, 328 U.S. 549, 553–54 (1946), *abrogated by Wesberry v. Sanders, 376 U.S. 1, 6–7 (1964)* (holding that whether districts must have equal populations was a question committed to Congress, as the Court lacked standards to redraw districts to have equal populations); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (finding military oversight committed to the political branches); *Nixon*, 506 U.S. at 230, 236, 238 (1993) (finding the discovery of standards to review Senate impeachment "trials" under Article I, § 3 beyond the Court's capacity, noting the potential "chaos" resulting from the Court overturning a Senate trial, and concluding that such trials are exclusively committed to the Senate); *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (finding it "dubious" that partisan gerrymandering violates the Equal Protection Clause, and finding prospective standards "severely unmanageable"). *Cf. Powell v. McCormack*, 395 U.S. 486 519–22 (1969) (holding that the basis for the U.S. House's refusal to seat an elected Representative *was justiciable*).

Vieth was an exception in abstaining—but not holding the question exclusively committed, 541 U.S. at 278. However, notably and perhaps decisively, *Vieth* doubted that partisan gerrymandering implicates the Equal Protection Clause in the first place, *id.* at 286. Three years before *Vieth*, in *Gralike*, and four years later in *Heller*, the Court enforced what it viewed as clear

violations without generally applicable standards. *See* discussion *supra* pp. 28–29.

Here, we have a clear constitutional command, and discoverable standards similar in manageability to those this Court has announced to enforce a wide range of constitutional mandates. *See, e.g.*, *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001) (Takings); *Strickland v. Washington*, 466 U.S. 668 (1984) (Right to Counsel under the Sixth Amendment); *INS v. Chadha*, 462 U.S. 919 (1983) (Bicameralism & Presentment); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (Due Process); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (Equal Protection); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936) (Case or Controversy; Disposal Power); *Ex parte Wilson*, 114 U.S. 417 (1885) (Infamous Crimes under the Fifth Amendment); *Gibbons v. Ogden*, 9 Wheat. 1 (1824) (Commerce).

Standards need not be simple in order to be adequately manageable. *See Zivotofsky*, 566 U.S. at 201 ("To say that [a] claim presents issues the Judiciary is competent to resolve is not to say * * * [resolution] is simple."); *id.* at 211–12 (Alito, J., concurring) (noting that determining the constitutionality of a statute may not be "an easy matter" but not necessarily "a political question that the Judiciary is unable to decide"); *id.* at 204 (Sotomayor, J., concurring) ("[C]ourts are []capable of interpreting or applying somewhat ambiguous standards using familiar tools of statutory or constitutional interpretation."); *Kerr v. Hickenlooper*, 759 F.3d 1186, 1193–94 (10th Cir. 2014) (Gorsuch, J., dissenting from the denial of

reh'g en banc) ("[P]rinciples and precedents don't always dictate a single right answer.").

"[A]pplication of the doctrine ultimately turns, as Learned Hand put it, on 'how importunately the occasion demands an answer.'" *Nixon v. United States*, 506 U.S. 224, 253 (1993) (Souter, J., concurring) (quoting L. Hand, *The Bill of Rights* 15 (1958)). The Court's precedents have remained consistent with Judge Hand's prescient observation for the past sixty years. And this case calls for such an answer, ahead of the 2020 redistricting cycle.

B. Sequential Analysis Using *Baker*'s Second Prong Dispels Any Implied Commitment to a Political Branch

In analyzing this case under the *Baker* criteria, this Court should consider the discrete elements of *Baker*'s second prong, on standards, in a *sequential* fashion. The plurality in *Vieth simultaneously* looked to whether (1) partisan gerrymandering implicates the Equal Protection Clause, (2) whether standards relevant to such an equal protection violation are discoverable, and (3) if such standards are manageable. *See Vieth*, 541 U.S. at 284–86. This simultaneous handling of all three of these analyses was unhelpful, as each successive analysis should start with the results of the prior analysis.

Baker v. Carr held that a question's commitment to a political branch may be indicted by a "lack of discoverable and manageable standards." *Baker*, 369 U.S. at 217. *Davis v. Bandemer* restated the standards prong in *Baker* as the lack of

"*judicially discernible* and manageable standards." *Davis v. Bandemer*, 478 U.S. 109, 123 (1986) (emphasis added). *Vieth v. Jubelirer* refined "judicially discernible" as "being relevant to some constitutional violation." *Vieth*, 541 U.S. at 288.

Any standard for determining a violation of Article I must relate to its text and precedents. *See supra* Section I.A. The initial showing here, that Article I is implicated, supports the follow-on discovery and assessment of standards. The combined analysis in *Vieth* showed the difficulty of simultaneously determining (1) whether the Pennsylvania legislature's revision of the state's congressional districts implicated a constitutional provision; (2) if a standard confirming such a violation was available; and (3) whether such standard was adequately manageable. *See id.* at 284–86 (using this process to determine if a predominant intent standard was "discernible and manageable" for deciding an equal protection claim of statewide partisan gerrymandering).

These are inherently sequential steps. The first two—determining that Article I is implicated, and discovering a standard to confirm its violation—are essentially different levels of the same inquiry. The first is a high-level inquiry—as this Court performed in *Gralike* and *Heller*—through interpretation of the constitutional text as informed by precedents. Here, the interpretation itself serves as a high-level standard. *See supra* Section I.A., p. 15 (deriving straightforward high-level standards from the text and this Court's precedents on Article I).

Beyond these high-level standards, which alone are adequate here, more generally applicable subsidiary standards are readily discoverable from what is discernible from the evidence that confirms a violation or actionable violation—the concerted statewide cracking and packing of Appellees and similarly situated Democratic voters that was shown to be the predominant focus of each district's design. *See supra* Section I.A., pp. 16–17 (deriving a subsidiary standard based on the methods used to violate Article I—cracking and packing of disfavored voters). *See supra* Section I.A., pp. 13–14, 19 (deriving further actionable standards that could limit intervention to cases posing greatest impacts).

Where a violation is demonstrated from a standard adequate for the case at hand, less than ideal manageability, without more, should rarely if ever signify an implied commitment to a political branch—and thus allow a clear violation to escape judicial intervention. *Cf. Vieth*, 541 U.S. at 286. ("[C]ourts might be justified in accepting a modest degree of unmanageability to enforce a [clear] constitutional command * * * ."). Manageability here is consistent with standards enforcing other constitutional rights. *See supra* Section II.A., p. 32. And the clear command of Article I confers a particularly strong duty to intervene here. *See Smiley*, 285 U.S. at 369.

Prudential considerations should be considered last. Where a violation is shown, only extraordinary prudential ramifications should imply an exclusive commitment. Here, the ramifications soundly dispel any such commitment—as abstention would leave

this abridgment of representational rights in place, to be copied after the 2020 census by more state legislatures seeking to choose the party in control of the U.S. House of Representatives.

* * *

Maryland's General Assembly proposed a compact with North Carolina and other states whereby they would mutually cease and desist from partisan gerrymandering. Fiscal Note, S.B. 1023, 2017 Reg. Sess. (Md.). The proposal went nowhere, and was not likely expected or intended to. But North Carolina and Maryland already have such a compact—the United States Constitution—that forbids state legislatures to take, barter, trade, or hold hostage any slice of their voters' unfettered right to fully choose their Representatives.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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